LIBRARY
SUPREME COURT, U. S.

FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-152

CHARLES WILLIAM WHORLEY,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

F. GUTHRIE GORDON III
1111West Main Street
Charlottesville, Virginia 22903

PAUL WHITEHEAD, JR.
P. O. Box 1389
Lynchburg, Virginia 24505

LOWE AND GORDON, LTD.
1111West Main Street
Charlottesville, Virginia 22903
Tele. No. 804-296-8188

Attorneys for Petitioner

Table of Contents

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provisions, Statutes Involved 2

Statement of the Case 7

Reasons for Granting the Writ 8

CONCLUSION 10

APPENDIX

Opinion of the Supreme Court of Virginia 1a-9a

Notice of Appeal 10a

Table of Authorities

CASES	PAGE
Argersinger v. Hamlin, 407 U.S. 25 (1972)	Throughout
Berry v. City of Cincinnati, 414 U.S. 29 (1973)	Throughout
Clay v. Wainwright, 470 F 2d 478 (5th Cir. 1972)	8, 9
Cottle v. Wainwright, 477 F 2d 269 (5th Cir. 1973) and 493 F 2d 397 (5th Cir. 1974)	8, 3a
Ferguson v. Gathright, 485 F 2d 504 (4th Cir. 1973)	8, 4a
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	9
Loper v. Beto, 405 U.S. 473 (19)	9
Marston v. Oliver, 485 F 2d 705 (4th Cir. 1973)	8, 2a, 4a, 5a, 6a
Mays v. Harris, ... F 2d ..... (4th Cir. 1975, decided June 25, 1975, no. 74-1490) reversing 369 F Supp. 1343 (W.D. Va. 1973)	8, 9, 5a
Mempha v. Rhay, 389 U.S. 128 (1967)	9
O'Shea v. United States, 491 F 2d 774 (1st Cir. 1974)	9
Potts v. Superintendent, 213 Va. 432, 192 S.E. 2nd 780 (1972)	2a
Sibron v. New York, 392 U.S. 410 (1968)	9
Whorley v. Commonwealth, ... Va. ..... (1975)	8, 5a
Whorley v. Brillhart, 373 F Supp. 83	4a, 5a

Statutes

§46.1-387.2 Code of Va. (1950) as Amended	4
§46.1-387.4 Code of Virginia (1950) as Amended	5
28 U.S. C. 1257 (3)	2

Constitutional Authority

United States Constitution, Sixth Amendment	2
United States Constitution, Fourteenth Amendment	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

CHARLES WILLIAM WHORLEY,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Opinion Below

The opinion of the Supreme Court of Virginia from which judgment Appellant appeals was reported on April 28, 1975, Record No. 74-0490, ... Va. ..... (1975) and is set forth in the Appendix, infra, at pp. 1a-10a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on April 28, 1975.

The jurisdiction of the Supreme Court of the United States to review this judgment is conferred by 28 U.S.C. 1257 (3).

Question Presented

Whether a conviction of violation of Habitual Offender Order may properly lie when the Habitual Offender Order is based, in material part, upon a misdemeanor conviction obtained in the absence of counsel and which resulted in a jail sentence in violation of the doctrine of *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Berry v. City of Cincinnati*, 414 U.S. 29 (1973).

Constitutional Provisions and Statutes Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, § 6:

> All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Habitual Offender Act, Code §§46.1-387.1, et seq.:

§ 46.1-387.2 Habitual offender defined.—An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsection (a), (b) and (c), of this section, committed within a ten-year period, provided that where more than one included offense shall be committed within a six-hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article, and provided further the date of the offense most recently committed occurs on or after June twenty-eight, nineteen hundred sixty-eight, and within ten years of the date of all other offenses the conviction for which is included in subsections (a), (b) or (c) as follows:

(a) Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate and distinct offenses arising out of separate acts:

(1) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;

(2) Driving or operating a motor vehicle while under the influence of intoxicants or drugs in violation of § 18.1-54;

(3) [Repealed.]

(4) Driving a motor vehicle while his license, permit or privilege to drive a motor vehicle has been suspended or revoked in violation of §§ 18.1-60, 46.1-350 or 46.1-351;

(5) [Repealed.]

(6) Knowingly making any false affidavit or swearing or affirm-

ing falsely to any matter or thing required by the motor vehicle laws or as to information required in the administration of such laws in violation of § 46.1-15;

(7) Any offense punishable as a felony under the motor vehicle laws of Virginia or any felony in the commission of which a motor vehicle is used;

(8) Failure of the driver of a motor vehicle involved in an accident resulting in the death or injury of any person to stop close to the scene of such accident and report his identity in violation of § 46.1-176; or

(9) Failure of the driver of a motor vehicle involved in an accident resulting only in damage to an attended or unattended vehicle or other property in excess of two hundred fifty dollars to stop close to the scene of such accident and report his identity or otherwise report such accident in violation of law.

(b) Twelve or more convictions, or findings of not innocent in the case of a juvenile, of separate and distinct offenses, singularly or in combination, in the operation of a motor vehicle which are required to be reported to the Division of Motor Vehicles and the commission whereof requires the Division of Motor Vehicles or authorizes a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subsection (a) above when taken with and added to those offenses described herein.

(c) The offenses included in subsections (a) and (b) hereof shall be deemed to include offenses under any valid town, city or county ordinance paralleling and substantially conforming to the State statutory provisions cited in subsections (a) and (b) hereof and all changes in or amendments thereof, and any federal law, any law of another state or any valid town, city or county ordinance of another state substantially conforming to the aforesaid State statutory provisions.

(d) Any person twenty-one years of age, or older who has been adjudged an habitual offender based in whole or in part on findings of not innocent as a juvenile may petition the court in which he was found to be an habitual offender, or any circuit court in Virginia having criminal jurisdiction in the political subdiviision in which such person now resides, for restoration of his privilege to operate a motor vehicle in this State. Upon such petition, and for good cause shown, such court may, in its discretion, restore to such person the privilege to operate a motor vehicle in this State upon such terms and conditions as the court may prescribe, sub-

ject to other provisions of law relating to the issuance of operators' or chauffeurs' licenses.

§ **46.1-387.4. Information to be filed by attorney for Commonwealth.**—The attorney for the Commonwealth, upon receiving the aforesaid transcripts or abstracts from the Commissioner, shall forthwith file information against the person named therein in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides. In the event such person is a nonresident of this State, the attorney for the Commonwealth of the city of Richmond shall file information against the accused person in the Circuit Court of the city of Richmond. The clerk of the Circuit Court of the city of Richmond shall be allowed a fee of five dollars for each such information filed against such nonresident accused to be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court as provided in § 19.1-317 and to be taxed against the defendant as a part of the costs of such proceeding, if the defendant is found to be an habitual offender. In the event the accused is an inmate of the Virginia State Penitentiary, jurisdiction for the proceedings shall be as provided in § 53.295.

§ **46.1-387.6. Order of court.**—If the court finds that such person is not the same person named in the aforesaid transcript or abstract, or that he is not an habitual offender under this article, the proceeding shall be dismissed, but if the court finds that such person is the same person named in the aforesaid transcript or abstract and that such person is an habitual offender, the court shall so find and by appropriate order direct such person not to operate a motor vehicle on the highways of the Commonwealth of Virginia and to surrender to the court all licenses or permits to operate a motor vehicle on the highways of this State for disposal in the manner provided in § 46.1-425. The clerk of the court shall file with the Division of Motor Vehicles a copy of such order which shall become a part of the permanent records of the Division.

§ **46.1-387.8. Operation of motor vehicle by habitual offender prohibited; penalty; enforcement of section.**—It shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect, except that such an order shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of

land shall not exceed five miles. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years and no portion of such sentence shall be suspended, except that in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this State. If the court deetermines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial.

Statement of the Case

On November 4, 1970, an information was filed against Petitioner Whorley in the Circuit Court for Bedford County under Virginia's Habitual Offender Act, §46.1-387.4 Code of Virginia (1950) as Amended. One of the misdemeanor convictions relied upon was uncounseled and resulted in a jail sentence. Upon review of Petitioner's certified abstract, the Court adjudged him an "habitual offender" under §46.1-387.2 of the Code of Virginia.

On January 16, 1973, Petitioner Whorley was arrested and charged with having operated a motor vehicle in violation of the Habitual Offender Order entered as a result of the proceedings hereinbefore mentioned. Whorley was tried in the Circuit Court for Campbell County on April 16, 1973 and Petitioner Whorley entered a plea of "not guilty." He asserted that the Habitual Offender Order entered against him had been based upon a misdemeanor conviction obtained without assistance of counsel, which re-

sulted in a jail sentence and that said Order was therefore invalid.

Whorley was convicted and sentenced to one year in the penitientiary on January 25, 1974. On February 20, 1974, Notice of Appeal and Assignment of Error was timely filed in the Supreme Court of Virginia. In the Notice of Appeal, Petitioner Whorley reiterated the contention that the Habitual Offender Order was invalid, stating (in Assignment of Error No. 3) that said Order was based, in substantial part, upon an uncounseled misdemeanor conviction and jail sentence. In said misdemeanor proceedings, Petitioner was not represented by counsel, nor advised of his right to counsel, nor did he waive his right to counsel.

The Supreme Court of Virginia, after granting appeal and entertaining the briefs and argument of counsel, affirmed the conviction as set forth in the Appendix, infra, on April 28, 1975.

Reasons for Granting the Writ

This case raises the important issue of the retroactivity of *Argersinger v. Hamlin*, 407 U.S. 25 (1972) with respect to the collateral consequences flowing from a pre-*Argersinger*, uncounseled misdemeanor conviciton that resulted in a jail sentence.

As such, it is the next logical link in the *Argersinger* chain after *Berry v. City of Cincinnati*, 414 U.S. 29, (1973).

This difficult issue has resulted, not only in a split among the various Federal Circuits (compare *Clay v. Wainwright*, 470 F 2d 478 (5th Cir. 1972) with *Marston v. Oliver*, 485 F 2d 705 (4th Cir. 1973)), but even within the panels of the Fourth Circuit itself. (Compare *Ferguson v. Gathright*, 485 F 2d 504 (4th Cir. 1973) with *Mays v. Harris*, ... F 2d ..... (4th Cir. 1975, decided

June 25, 1975, no. 74-1409) reversing 369 F Supp. 1348 (W.D. Va. 1973)).

Petitioner Whorley contends that his 1969 uncounseled misdemeanor conviction which resulted in a jail sentence is void under the doctrine of *Argersinger* and *Berry*, and that his 1970 Habitual Offender Order is void because there are not sufficient valid convictions to sustain it. §46.1-387.2 Code of Virginia (1950) as Amended. If the Order is void, Petitioner cannot be guilty of violating it.

In reviewing Petitioner's argument, the Supreme Court of Virginia affirmed Petitioner's conviction, claiming that *Argensinger* affected only jail sentences, not convictions. By this reasoning, only the already served jail sentence portion of Petitioner's 1969 conviction was void, not the conviction itself. *Whorley v. Commonwealth* ..... *Va.* ..... (1975) (Appendix at 6a-7a).

This reasoning is plainly at odds with the reasoning of *Argersinger*, and with the clear mandate of *Berry*, supra. See *Cottle v. Wainwright*, 477 F 2d 269 (5th Cir. 1973) and 493 F 2d 397 (5th Cir. 1974).

In those cases, it is clear that the threat of a jail sentence is the catalyst that brings the right to counsel rule into effect, and that any conviction obtained in the absence of counsel is void because the Defendant did not have a fair opportunity to test the State's evidence fully, in violation of the Fourteenth Amendment's due process clause.

This Court has long held that a felony conviction obtained without counsel is void, *Loper v. Beto*, 405 U.S. 473 (1966), even if the sentence has been fully served and the only consequences remaining are collateral. *Sibron v. New York*, 392 U.S. 40 (1968); see also *O'Shea v. United States*, 491 F 2d 774 (1st Cir. 1974).

The Fifth Circuit has correctly ruled that a pre-*Argersinger* uncounseled misdemeanor conviction that led to the Petitioner's parole could not result in the same Petitioner's

revocation of parole since the underlying conviction was void. *Clay v. Wainwright*, supra.

The analogy to the present case is precise. Petitioner's Habitual Offender status, like Clay's parole status, grew out of his uncounseled misdemeanor conviction. And Petitioner's prosecution, like Clay's probation revocation, would not exist but for the status growing out of the void conviction. See also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Mempha v. Rhay*, 389 U.S. 128 (1967).

Finally, it should be noted that, to some extent at least, the split in the Circuits, as well as within the Fourth Circuit, stems from a misinterpretation of *Argersinger* which should unquestionably be clarified.

It is also anticipated that *Mays v. Harris*, decided on June 25, 1975 in the Fourth Circuit, will be appealed to this Court depending on the outsome of a request for rehearing en banc filed by both parties and it would be appropriate for this Court to consider both bases together as the facts of this case and those of *Mays v. Harris* are virtually identical.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue in this case.

Respectfully submitted,

F. GUTHRIE GORDON III
JOHN C. LOWE
Lowe and Gordon, Ltd.
1111 W. Main St.
Charlottesville, Va. 22903

PAUL WHITEHEAD, JR.
P. O. Box 1389
Lynchburg, Va. 24505

Attorneys for Petitioner

MAILING CERTIFICATE

I, F. Guthrie Gordon III, counsel for Petitioner in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the day of July 1975, I mailed three copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Virginia by first class mail to the Honorable Andrew P. Miller, Attorney General of Virginia, Supreme Court-State Library Building, Richmond, Virginia 23219, counsel for the Commonwealth of Virginia.

F. GUTHRIE GORDON III

Present: All the Justices

CHARLES WILLIAM WHORLEY

-v- Record No. 740490

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE ALBERTIS S. HARRISON, JR. Richmond, Virginia, April 28, 1975

FROM THE CIRCUIT COURT OF CAMBELL COUNTY

William W. Sweeney, Judge

We decide here whether the Commonwealth may rely upon an order adjudging a defendant to be a habitual offender which is based, in part, upon a misdemeanor conviction obtained in the absence of counsel.

On November 4, 1970, action was taken against Charles William Whorley in the Circuit Court of Bedford County under the Virginia Habitual Offender Act, Code §46.1-387.6. He was adjudged to be a habitual offender, and this resulted in the revocation of his driver's license for a period of ten years. The defendant was advised that if he were convicted of operating a motor vehicle in Virginia during the period of suspension he could be sentenced to no less than one nor more than five years in the penitentiary.

The decision in Bedford was reached on the basis of Whorley's numerous convictions for violating the motor vehicle laws, including a conviction on September 26, 1969, in the municipal court of the City of Lynchburg, for driving a motor vehicle while under the influence of intoxicants, second offense.

On January 6, 1973, an automobile operated by Whorley was involved in a "hit and run" accident in Campbell County. Investigation disclosed that prior thereto he had been adjudged a habitual offender, and he was charged

with having operated a motor vehicle after he had been so adjudged. On January 25, 1974, he was sentenced to serve one year in the penitentiary. The sole defense that Whorley offered at the January 25th trial was that his September 26, 1969 conviction for drunken driving in Lynchburg was null and void because he was not afforded representation by counsel, and he had not waived such representation.

Defendant's argument is two-fold. He says that the rule announced by the United States Supreme Court in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), is retroactive in effect. He also contends that the effect of a retroactive application of *Argersinger* is to void Whorley's September 26, 1969 conviction, and thus to render the 1970 habitual offender adjudication void as having been based upon a void conviction.

In *Argersinger* the court held that: "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U. S. at 37. We apply *Argersinger* retroactively in view of *Berry* v. *City of Cincinnati*, 414 U. S. 29, 30 (1973), where the court announced that:

> "Those convicted prior to the decision in *Argersinger* are entitled to the constitutional rule enunciated in that case . . . if they allege and prove a bona fide, existing case or controversy sufficient to invoke the jurisdiction of a federal court."

The effect of *Berry* was to overrule *Potts* v. *Superintendent*, 213 Va. 432, 192 S. E. 2d 780 (1972).

Pertinent to our decision here, and closely related to the issue that confronts us, is a series of federal cases in the United States Court of Appeals for the Fourth Circuit and in the United States District Courts for Virginia.

Marston v. *Oliver*, 485 F. 2d 705 (4th Cir. 1973), involved a petitioner in a habeas proceeding who was convicted in Virginia of driving a motor vehicle while his

driver's license was revoked. He was indigent and was not provided counsel at trial. Upon conviction he received a prison sentence and a fine. As a result of the conviction and his prior record, he was adjudged a habitual offender, and his driver's license was revoked for a period of ten years. The United States District Court ruled invalid the conviction because Marston was an indigent defendant and was not afforded counsel. The case was appealed and decided prior to *Berry*. Judge Russell, in discussing whether the court would give *Argersinger* retroactive application, said:

> "We would not like to be misunderstood. We find no quarrel with the result reached in *Cottle*,[1] where the effect of the uncounseled prior misdemeanor conviction was the automatic and immediate loss of liberty on the part of the defendant. In such a situation, we, too, would find *Argersinger* retroactive. Where we would not give it retroactive application is in those cases, like that here, in which the conviction provides merely the possibility of a basis for a loss of a civil right in a subsequent civil proceeding but involves no warrant for imprisonment and where any retroactive application would result in a substantial frustration of a valuable public policy of barring the public highways to criminally careless drivers who represent a peril and hazard to the traveling public." 485 F. 2d at 710.

---

1 *Cottle* v. *Wainwright*, 477 F. 2d 269 (5th Cir. 1973). *Argersinger* was retroactively applied to an uncounseled misdemeanor conviction which had been the basis of a parole revocation. In a memorandum decision, *Wainwright* v. *Cottle*, 414 U.S. 895 (1973), the Supreme Court vacated the judgment and remanded the case for further consideration in light of *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). The Circuit Court of Appeals for the Fifth Circuit remanded the case to permit parole authorities to consider whether particular facts of the parole revocation proceeding required that the parolee have counsel, but the court reiterated that the uncounseled misdemeanor conviction could not be used as a basis for parole revocation. *Cottle* v. *Wainwright*, 493 F. 2d 397 (5th Cir. 1974).

Ferguson v. *Gathright*, 485 F. 2d 504 (4th Cir. 1973), decided one day prior to *Marston*, is a case of a habitual offender seeking habeas relief, who also argued that the revocation of his driver's license was invalid for failure of the state, at his revocation hearing, to furnish him counsel. After exhaustion of state remedies, he filed his federal action. The District Court denied relief, and the Circuit Court of Appeals affirmed. The court held that whether the petitioner was indigent or not, there was no obligation on the part of the state to furnish him counsel at his license revocation hearing. The significance here of *Ferguson* is that the court, again speaking through Judge Russell, observed that there was no loss of liberty from the license revocation for '[i]t is his subsequent defiance of the law, and only indirectly his revocation proceedings, that brings into play the criminal processes and places him in peril of imprisonment." 485 F. 2d at 506.

In *Morgan* v. *Juvenile & Dom. Rel. Ct., Halifax County, Va.*, 491 F. 2d 456 (4th Cir. 1974), decided subsequent to *Berry*, *supra*, the petitioner was denied habeas corpus relief from a conviction in a state court of the misdemeanor of nonsupport. The court said:

> "Even prospectively *Argersinger* excises from the uncounseled misdemeanor conviction only those consequences, direct or collateral, which relate to loss of liberty or imprisonment. Since Morgan is no longer imprisoned and alleges no collateral consequences placing his continued liberty in jeopardy, even if he was denied counsel at trial and there was no knowing and intelligent waiver of counsel, he is not entitled to habeas corpus relief. . . ." 491 F. 2d at 457.

The defendant Whorley has heretofore unsuccessfully sought relief in the federal courts. United States District Judge Merhige determined that the Virginia adjudication that Whorley was a habitual offender could not "constitute custody" within the meaning of the federal habeas statute. *Whorley* v.*Brillhart*, 359 F. Supp. 539 (E. D. Va. 1973).

Thereafter Whorley amended his original complaint to allege and contest his Campbell County conviction, and he was again denied relief. In the case *Whorley* v. *Brillhart*, 373 F. Supp. 83 (E. D. Va. 1974), the court said:

> "The Court of Appeals, which this Court is duty bound to follow, apparently read *Argersinger* to mean that an uncounseled misdemeanor judgment of conviction, which results in loss of liberty or imprisonment, is not invalid, *per se*, except as to that part of the judgment resulting in the loss of liberty or imprisonment; consequential civil disabilities are not.
>
> * * * * *
>
> "Under the decisions in *Marston*, *supra*, and *Morgan*, *supra*, the plaintiff's intervening loss of his driver's license was a valid result of his uncounseled misdemeanor conviction; which, itself, remained valid in all respects, save the term of imprisonment imposed. The license revocation itself having been valid, the conviction thereafter for driving on a revoked license should also be valid. . . ." 373 F. Supp. at 85, 86.

Simultaneously with second *Whorley*, the court announced *Hensley* v. *Ranson*, 373 F. Supp. 88 (E. D. Va. 1974). There Judge Merhige refused to prohibit the Commonwealth from continuing with a habitual offender proceeding, based upon an uncounseled misdemeanor conviction, when there existed only the threatened loss of the petitioner's driving privileges and the "vague possibility" that he might later be arrested for driving after revocation.

In *Mays* v. *Harris*, 369 F. Supp. 1348 (W. D. Va. 1973), Chief Judge Dalton reached a conclusion *contra* to the holdings of the Circuit Court of Appeals and Judge Merhige, and gave full retrospectivity to *Argersinger*. *Mays* is presently pending on appeal in the Fourth Circuit.

We approve and adopt the conclusion of the Circuit

Court of Appeals in *Marston*, *Ferguson* and *Morgan*, followed by Judge Merhige in *Whorley* and *Hensley*, that *Argersinger* excises from an uncounseled misdemeanor conviction only direct or collateral consequences which relate to the loss of liberty and imprisonment. An uncounsel misdemeanor conviction, although resulting in imprisonment is not invalid *per se*, and consequential civil disabilities are not invalid.

While *Argersinger* borrowed liberally from *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the *Gideon* doctrine was not enlarged in its entirety so as to nullify all uncounseled misdemeanor convictions. Throughout its opinion in *Argersinger* the Supreme Court, speaking through Mr. Justice Douglas, reiterated its intent to abrogate not the uncounseled misdemeanor conviction but the subsequent sentence of imprisonment. We note the following language in the opinion:

> "We hold, therefore, that absent a knowing and intelligent waiver, *no person may be imprisoned for any offense*, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (Emphasis supplied)
>
> * * * * *
>
> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that *no imprisonment may be imposed*, even though local law permits it, unless the accused is represented by counsel. . . .
>
> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in *the actual deprivation of a person's liberty*, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's *liberty* is in jeopardy." (Emphasis supplied) 407 U. S. at 37, 40.

Mr. Justice Powell, concurring in the result, referred to

the majority opinion and said: "In simplest terms this means that under no circumstances, in any court in the land, may anyone be imprisoned — however briefly — unless he was represented by, or waived his right to, counsel." 407 U. S. at 52. However, Mr. Justice Powell did note that the opinion of the court made a clear distinction between the loss of liberty and other rights.

The Supreme Court of Arizona followed the Fourth Circuit in deciding *State* v. *Sanchez*, 110 Ariz. 214, 516 P. 2d 1226 (1973). It held that a civil revocation of a license pursuant to a state statute may be based upon a conviction for driving while intoxicated obtained as a result of a proceeding in which the defendant was not represented by counsel, and that a person whose license had been thus validly revoked could be convicted for driving while under the influence with a revoked license. *See also State* v. *Zaragoza*, 21 Ariz. App. 596, 522 P. 2d 552 (1974).

Virginia's Habitual Offender Act declared it to be the policy of the state to provide maximum safety for all persons using the highways; to deny the privilege of operating motor vehicles to persons who by their record have demonstrated their indifference to the safety of others and their disrespect for the laws of the state and the orders of its courts; to discourage repetition of criminal acts by individuals; and to impose increased and added deprivation of the privilege to operate motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

A reference to the record and to the past conduct of Whorley shows conclusively that he has earned the status of a habitual offender, and that to permit him to resume the use of the public highways would represent a serious hazard to the public.

The privilege of operating a vehicle on the highways of Virginia is granted to those who qualify. It is a privilege that can be withdrawn, revoked or suspended under certain conditions. A proceeding under Virginia's Habitual

Offender Act is not a criminal proceeding. It is one designed solely to determine if the past record of an automobile driver is such that he has become a menace on the highways and is a habitual offender. In such a proceeding no fines are imposed, and no loss of liberty is involved. The only result of an adjudication of being a habitual offender is the entry by the court of an order directing such offender not to operate a motor vehicle on the highways of Virginia, and to surrender his license or permit to operate such a vehicle. The offender lives under no threat by the state of incarceration. He is deprived of no civil liberties, rights or privileges, other than the privilege of operating a vehicle on the highways. This privilege as been denied thousands of others who have run afoul of the motor vehicle laws of the state.

If a habitual offender subsequently decides to take the law into his own hands by operating a motor vehicle on the public highways without a valid permit, he becomes subject to prosecution under a criminal law which deals with habitual offenders who drive without a license, and he may receive a greater penalty than a defendant who is not a constant violator of traffic laws. This situation does not arise because of any previous conviction that he may have had during the time that he was accumulating the record that made him a habitual offender. It occurs solely because of his subsequent and deliberate defiance of the law.

A previous conviction and a habitual offender adjudication only bear indirectly on the criminal process that places such offender in peril of imprisonment. In the instant case it was not the Lynchburg conviction that jeopardized Whorley's liberty. It was the fact that after he had been adjudged a habitual offender he voluntarily involved himself in the commission of a criminal act in Campbell County. The link between Whorley's uncounseled misdemeanor conviction in Lynchburg and his conviction for driving in Campbell County after being adjudged a habitual offender is not only remote, but would be nonexistent except for the deliberate commission of a criminal act by defen-

dant. It was his option, and by his choice, that his liberty was placed in jeopardy.

The far-reaching and catastrophic effect of holding that *Argersinger* completely voids every uncounseled misdemeanor conviction has been heretofore described in *Potts* v. *Superintendent*, *supra*, by Judge Russell in *Marston*, and by Mr. Justice Powell in *Argersinger*. We would further observe that to set aside the Lynchburg conviction because the jail sentence was imposed in the absence of counsel would accord Whorley a preferred position over that occupied by a motor vehicle offender who suffered imposition of a fine only. Reason, logic and the orderly administration of justice, as well as a fair reading of Mr. Justice Douglas' opinion, require that an uncounseled misdemeanor conviction, as distinguished from the sentence of imprisonment, be invulnerable to an *Argersinger* challenge.

The judgment of the lower court is

Affirmed.

VIRGINIA:
IN THE CIRCUIT COURT OF CAMPBELL COUNTY
COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

NOTICE OF APPEAL AND

ASSIGNMENTS OF ERROR

CHARLES WILLIAM WHORLEY,

Defendant

Notice is hereby given, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, that Charles William Whorley, the defendant above mentioned, hereby appeals to the Supreme Court of Virginia from the final judgment entered in this action on January 25, 1974.

The Transcript or statement of facts, testimony or other incidents of the case, will be filed in the office of the Clerk within the time prescribed by Rule 5:9 of the Rules of the Supreme Court of Virginia.

Pursuant to the aforesaid Rules, the aforesaid defendant makes this his assignments of error and alleges that the Court erred:

In entering up judgement against the defendant finding him guilty of being a habitual offender violator and fixing his punishment at one year in the penitentiary, as evidence was presented at this trial to show that the Order entered in the Circuit Court of Bedford County, Virginia on November 4, 1970, declaring the defendant a habitual offender and ordering him not to operate a motor vehicle on the highways of the Commonwealth for a period of ten years from the date of said Order was based in part upon a conviction of the defendant for driving under the influence of intoxicants, second offense, in the Municipal Court of the City of Lynchburg, Virginia, on September 26, 1969, wherein said defendant was not represented by counsel, was not advised of any right to counsel and did not waive

his right to counsel, and was therein convicted and given a jail sentence of thirty days and fined $200.00 and therefore the defendant was denied counsel and therefore this conviction should be void under the decision handed down in the case of *Argersinger v. Hamlin*, 407 U.S. 25 (1972); said rule having been declared retroactive under the decision handed down by the United States Supreme Court on November 6, 1973, *Berry v. City of Cincinnati*, (U.S.....Docket Number 73-5245), L.W. 3268; therefore, the Order of the Circuit Court of Bedford County, Virginia declaring the defendant a habitual offender should be set aside since it was based upon an invalid conviction and the judgment of the Circuit Court of Campbell County, Virginia, entered on January 25, 1974, should be set aside.

PAUL WHITEHEAD JR.
Paul Whitehead, Jr., Attorney at Law
Whitehead Building, 721 Court Street
Lynchburg, Virginia, Attorney for the
defendant, Charles William Whorley

PAUL WHITEHEAD, JR., p.d.
Whitehead Building
721 Court Street
Lynchburg, Virginia

I, Paul Whitehead, Jr., attorney of record for the defendant, hereby certify, pursuant to Rule 5:1, that a copy of the above Notice of Appeal and Assignment of Error has this 20th day of February, 1974, been mailed to E. Bruce Harvey, Esquire, Commonwealth Attorney for the County of Campbell, Rustburg, Virginia, opposing counsel of record.

/s/*Paul Whitehead, Jr.*
PAUL WHITEHEAD, JR., Attorney
for the defendant

LIBRARY
SUPREME COURT, U.S.

FILED
JUN 20 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-132

CHARLES WILLIAM WHORLEY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition For A Writ Of Certiorari To The Judgment Of
The Supreme Court Of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

STUART BATEMAN
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

JURISDICTION 2

QUESTION PRESENTED

May One Who Is Civilly Classified As An Habitual Offender And Who Is Not Subject To A Present Deprivation Of Liberty In The Form Of A Jail Sentence, But Who Has, As A Basis For The Habitual Offender Status, A Previously Uncounseled Misdemeanor Conviction Which Resulted In A Jail Sentence Rather Than A Fine, Successfully Challenge His Status As An Habitual Offender By Subsequently Violating The Law Of A State That He Not Drive And Defending On The Basis Of The Retroactivity Of This Court's Decision In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972)? 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS 2

ARGUMENT

The Decision Of The Supreme Court Of Virginia In *Whorley* v. *Commonwealth* Is Clearly Correct And Eminently Fair To This Petitioner. There Is No Real Conflict In The Decisions Cited By The Petitioner In This Case, Since They Are Distinguishable Either On Their Facts Or They Are Not In Conflict. Nor Is This Court Likely On The Record Presented Here To Reach The Constitutional Issue With Respect To Retroactivity. 4

CONCLUSION 7

TABLE OF CITATIONS

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972) 2, 4

Berry v. City of Cincinnati, 414 U.S. 29 (1973) 4, 5, 6

Page

Carafas v. LaValle, 391 U.S. 234 (1968) 6

Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972) 5

Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973) 5

Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973) 5

Gideon v. Wainwright, 372 U.S. 335 (1963) 6

Ginsberg v. New York, 390 U.S. 629 (1968) 6

Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973) 5

Mays v. Harris, ... F.2d ....., Case No. 74-1409 (4th Cir. Aug. 26, 1975) 4, 5

Morgan v. Juvenile and Domestic Relations Court, 491 F.2d 456 (4th Cir. 1974) 5

Sibron v. New York, 392 U.S. 40 (1968) 6

Walker v. City of Birmingham, 388 U.S. 307 (1967) 4, 5

Whorley v. Commonwealth, 215 Va. 740, ... S.E.2d .... (1975) 1, 5

Other Authorities

28 U.S.C. § 1257(3) 2

Title 46.1-387.8, Code of Virginia (1950), as amended 3

In The

Supreme Court of the United States

October Term, 1975

No. 75-152

CHARLES WILLIAM WHORLEY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition For A Writ Of Certiorari To The Judgment Of
The Supreme Court Of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia in this case of April 28, 1975, not be granted.

The opinion of the Supreme Court of Virginia to which this petition lies was entered in this case on April 28, 1975, and is reported as *Whorley* v. *Commonwealth,* 215 Va. 740, ... S.E.2d ..... (1975). The opinion is set forth in the appendix to the petition for a writ of certiorari previously filed in this case.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

May One Who Is Civilly Classified As An Habitual Offender And Who Is Not Subject To A Present Deprivation Of Liberty In The Form Of A Jail Sentence, But Who Has, As A Basis For The Habitual Offender Status, A Previously Uncounseled Misdemeanor Conviction Which Resulted In A Jail Sentence Rather Than A Fine, Successfully Challenge His Status As An Habitual Offender By Subsequently Violating The Law Of A State That He Not Drive And Defending On The Basis Of The Retroactivity Of This Court's Decision In Argersinger v. Hamlin, 407 U.S. 25 (1972)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case are fully set out in the petition for a writ of certiorari previously filed in this case.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

On June 12, 1964, Whorley was convicted in the County Court of Bedford County, Virginia, of reckless driving and his license was suspended for a period of six months; on December 29, 1965, Whorley was convicted in the State of North Carolina of speeding 85 M.P.H. in a 65 M.P.H. zone; on January 16, 1968, Whorley was convicted in the County Court of Bedford County, Virginia, of drunk driving; on March 5, 1968, Whorley's driver's license was revoked and suspended as a result of the January 16, 1968, conviction;

on April 3, 1968, Whorley was convicted in the Municipal Court in Lynchburg, Virginia, of reckless driving and driving during the period of time when his license was revoked; on May 10, 1968, a further order of revocation and suspension of license was issued; on June 10, 1969, Whorley was convicted in the County Court of Bedford County, Virginia, of reckless driving; on July 22, 1969, Whorley was convicted in the County Court of Bedford County, Virginia, for illegal equipment; on September 26, 1969, Whorley was convicted in the Municipal Court of the City of Lynchburg of driving while under the influence of intoxicants, second offense; on December 23, 1969, a third order of revocation and suspension of Whorley's driver's license was issued as a result of the two convictions of driving while intoxicated.

As a result of these series of convictions, and other actions, on November 4, 1970, Whorley was adjudged an habitual offender and was ordered not to operate a motor vehicle on the highways of the Commonwealth of Virginia for a period of ten years. He was specifically advised at that time that, if he were convicted of operating a motor vehicle in Virginia during the period of suspension, he could be sentenced to not less than one, nor more than five years in the penitentiary. See § 46.1-387.8, Code of Virginia (1950), as amended, which may be found at pages 5-6 of the petition for a writ of certiorari.

On January 6, 1973, Whorley was arrested and charged with operating a motor vehicle in violation of the habitual offender order, entered as a result of the proceedings mentioned herein. Whorley was arrested because of his involvement in an accident near the City of Lynchburg, Virginia, when the automobile he was operating struck another vehicle in the rear and left 795 feet of skid marks from the point of impact to the point where the vehicle was abandoned. Whorley pleaded not guilty and offered as his sole

defense the proposition that his September 26, 1969, conviction for drunken driving in Lynchburg, Virginia, was null and void because he was not afforded representation by counsel, and he had not waived such representation. The Supreme Court of Virginia, after granting appeal and entertaining the briefs and arguments of counsel, affirmed the conviction as set forth in the appendix to the petition for a writ of certiorari.

ARGUMENT

The Decision Of The Supreme Court Of Virginia In Whorley v. Commonwealth Is Clearly Correct And Eminently Fair To This Petitioner. There Is No Real Conflict In The Decisions Cited By The Petitioner In This Case, Since They Are Distinguishable Either On Their Facts Or They Are Not In Conflict. Nor Is This Court Likely On The Record Presented Here To Reach The Constitutional Issue With Respect To Retroactivity.

Petitioner seeks in this case to raise an issue concerning the retroactivity of *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), under *Berry* v. *City of Cincinnati*, 414 U.S. 29 (1973). Neither case is applicable here, since Whorley is subject to imprisonment not as a result of his uncounseled misdemeanor conviction here, nor is he subject to reincarceration as a result of the uncounseled offense. Compare *Berry* v. *Cincinnati, supra*, and the cases cited therein where there was an existing case or controversy sufficient to invoke the jurisdiction of a Federal court. In Whorley's situation it was the subsequent violation of the law which placed his continued liberty in peril. See *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *Mays* v. *Harris*, ... F.2d ....., Case No. 74-1409 (4th Cir. Aug. 26, 1975).[1]

[1] The first *Mays* v. *Harris* decision, decided on June 25, 1975, and cited in the petition for a writ of certiorari filed herein, has been withdrawn by the Fourth Circuit Court of Appeals. Thus, there exists no conflict between the opinions of the Fourth Circuit or a split be-

It is of note that the Fourth Circuit Court of Appeals and the Supreme Court of Virginia are in agreement with the result reached in *Cottle* v. *Wainwright*, 477 F.2d 269 (5th Cir. 1973), vacated and remanded, 414 U.S. 895 (1973), rehearing, 493 F.2d 397 (5th Cir. 1974), in those situations where the uncounseled, prior misdemeanor conviction result was the automatic and immediate loss of liberty on the part of a defendant. See *Marston* v. *Oliver*, 485 F.2d 705, 710 (4th Cir. 1973), and *Whorley* v. *Commonwealth*, *supra* at 742.

Clay v. *Wainwright*, 470 F.2d 478 (5th Cir. 1972), is distinguishable from Whorley's situation on the facts. While Clay's potential reincarceration was the result of his subsequent violation of the law, it was at the trial of this subsequent offense, where Clay was an uncounseled misdemeanant, which brought Clay under the threat of loss of liberty by imprisonment at the parole revocation hearing. Compare the parallel stage in Whorley's case, which was his civil habitual offender determination, and which did not result in the immediate threat of imprisonment as did Clay's parole hearing. Whorley's subsequent deliberate violation of the order entered against him resulted in his peril. This peril was achieved only as a consquence of his violation of the order of the court, as in *Walker* v. *Birmingham*, *supra*. It is also in light of this particular fact that this Court should not exercise its discretion in granting certiorari on the grounds that, even if the opinion of the Supreme Court of Virginia and those of the Fourth Circuit Court of Appeals with respect to limitations placed on *Argersinger*, *supra* and

---

tween the panels. Compare *Marston* v. *Oliver*, 485 F.2d 705 (4th Cir. 1973); *Ferguson* v. *Gathright*, 485 F.2d 504 (4th Cir. 1973); *Morgan* v. *Juvenile and Domestic Relations Court*, 491 F.2d 456 (4th Cir. 1974) (decided post *Berry*, *supra*), and the second *Mays* v. *Harris* opinion of August 25, 1975. The respondent is advised that a Notice of Appeal has been filed in the second *Mays* v. *Harris* opinion to this Honorable Court.

Berry, supra, are incorrect, this Honorable Court is not likely to be confronted with that constitutional issue in light of Whorley's deliberate defiance of the order of the court.

It is respectfully urged, however, that the opinion of the Supreme Court of Virginia is clearly correct in that an uncounseled misdemeanant conviction, though resulting in imprisonment, is not invalid *per se,* but only to invalidate the imprisonment, and that the interpretation placed on *Berry, supra,* with respect to the existing case or controversy sufficient to invoke the jurisdiction of a Federal court be limited to those situations cited by this Court in *Berry,* where the appellate process was initiated at the time the aggrieved person was in custody as a direct result of the uncounseled conviction and there were some serious collateral consequences from the conviction adhering to the person. See *Sibron* v. *New York,* 392 U.S. 40 (1968); *Carafas* v. *LaVallee,* 391 U.S. 234 (1968); *Ginsberg* v. *New York,* 390 U.S. 629 (1968).

It is further submitted that the Supreme Court of Virginia was clearly correct in its interpretation of *Argersinger, supra,* with respect to the application of the *Gideon* doctrine. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). See *Whorley* v. *Commonwealth, supra,* at 744-5. The basis for such an interpretation is that the public has a superior interest in the safety of the highways of the various states than the uncounseled misdemeanant (as opposed to uncounseled felon) has in excising this particular collateral consequence. It is of note that the uncounseled misdemeanor conviction *and* the civil habitual offender proceeding were both prior to *Argersinger, supra.*

A further expansion of *Argersinger* and *Berry* to the facts of this case would be a significant expansion of the constitutional rule, which can be applied only in an unfair manner. It would allow a person of Mr. Whorley's status to challenge

successfully his separate and distinctly civil habitual offender determination after a deliberate violation of the law. The fact that such a person received a short prison term would grant him a favored treatment under the law in comparison to those persons who merely received fines as a result of uncounseled convictions, but who suffered the same collateral *civil* consequences. It is submitted that the Supreme Court of Virginia was entirely correct in its decision in the case below, and that this Honorable Court should consider the petition for a wrt of certiorari not well founded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

STUART BATEMAN
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219